No. 87-645

In The
Supreme Court of the United States
October Term, 1987

F. CLARK HUFFMAN, *et al.*,
Petitioners,

v.

WESTERN NUCLEAR, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Tenth Circuit

BRIEF OF AMICI CURIAE STATES IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The domestic uranium industry is not viable. Section 161(v) of the Atomic Energy Act of 1954 (42 U.S.C. 2201(v)) mandates that the Department of Energy (DOE), "to the extent necessary to assure the maintenance of a viable domestic uranium industry," *shall not* provide enrichment services for foreign-source uranium intended for domestic use. All parties agree that the purpose of Section 161(v) is to preserve and maintain a viable domestic uranium industry. All parties agree that DOE refused to impose restrictions on the enrichment of foreign uranium during the domestic industry's decline or subsequent to the time it became non-viable. DOE contends that the statute absolves it from the duty to impose restrictions if, in DOE's opinion, such restrictions would not restore the industry's viability.

The question is whether Section 161(v) requires DOE to restrict the enrichment of foreign uranium for domestic use when the domestic uranium industry is not viable.

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STATEMENT OF THE INTEREST OF THE AMICI CURIAE STATES

This brief is filed on behalf of the States of Arizona, Colorado, New Mexico, Nevada, Utah and Wyoming, and is sponsored by the Attorney General of Wyoming, as authorized by Supreme Court Rule 36.4. The Amici support the brief submitted by the Respondents and urge this Court to affirm the decision of the Court of Appeals for the Tenth Circuit.

Uranium ore has been mined and processed in each of the Amici Curiae States. Thus each State has a stake in

the economic viability of the domestic uranium industry. DOE's continued refusal to impose restrictions upon the enrichment of foreign-source uranium for domestic end-use so as to maintain the viability of the domestic uranium industry as required by Section 161(v) of the Atomic Energy Act is causing, and will continue to cause, serious harm to the economies of the Amici States, to the economies of local communities within these States, and to the citizens of these States.

I. HISTORICAL, FACTUAL AND PROCEDURAL STATEMENT

A. Governmental Involvement in the Nuclear Fuel Cycle

Naturally occurring uranium comprises two isotopes of that element: U235 and U238. U235 is the fissionable isotope, but it constitutes less than one percent of naturally occurring uranium. In order for uranium to be utilized as reactor fuel, the uranium must be enriched so that it is in the range of three percent to four percent U235. Historically, the Department of Energy (DOE) was the only provider of enrichment services in the free world; now the DOE is the only domestic supplier of enrichment services.

After World War II, the government initiated steps to develop the Nation's uranium resources both for defense and for peaceful domestic purposes. Because uranium and other nuclear material could be enriched and incorporated into weapons, the uncontrolled movement or

ownership of such material was perceived as a potential danger. In response to that perception, Congress provided that the government was to be the sole owner of such substances; consequently, uranium ore was mined and processed by private industrial concerns only under contract with the government.

Following that initial period of governmental ownership of nuclear material, Congress was persuaded that its earlier abundance of caution was unwarranted and amended the Atomic Energy Act in 1964 to allow private ownership of such material under license.

At the same time as private ownership became legally permissible, Section 161(v) was added to the Act. For several years thereafter, the Atomic Energy Commission (AEC), DOE's predecessor, imposed a total ban on the enrichment of foreign-source uranium for domestic end-use. Beginning in 1977, however, that ban was phased out, so that as of January 1, 1984, restrictions were completely eliminated.

During the period when enrichment restrictions were being phased out, foreign deposits of uranium ore were being developed. Meanwhile, demand for uranium increased less dramatically than DOE had forecast when it recommended phasing out the restrictions. Based in part upon DOE's erroneous projections of skyrocketing demand, world production soon exceeded the lower than expected world demand, and uranium prices plummeted from $40.00 per pound to current levels of less than $18.00 per pound. At these low prices, which when adjusted for inflation are less than the government supported prices prior to 1964, most of the domestic mines and mills closed. Cheap

imports of subsidized foreign uranium have increased, and have captured an increasing percentage of U.S. market share even as demand is increasing.[1] The proportion of foreign uranium being enriched by DOE for domestic use has been steadily increasing, from 7.2% in the 1977-1981 period to more than 50% in 1982. DOE projects that imports will rise to nearly 65% of domestic requirements 10 years hence in 1998. (See Letter of Nov. 27, 1981, n.2, *infra;* and DOE's 1986 Viability Assessment, Table 23 (DOE/EIA-0477(86))

The domestic uranium industry began experiencing a downturn between 1979 and 1981. (Pet. Brief, 6-8.) Since then, the industry has further declined to the point that it is no longer viable. (*Id.* 10-11.) During the period of decline, Respondents perceived that the viability of the industry was threatened and requested DOE to reimpose restrictions in order to maintain the viability of the industry. DOE cast aside those requests by asserting that the industry was still viable. DOE's response to industry concerns completely ignored the apprehensions Respondents

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[1]Domestic nuclear power plants consumed seven million pounds of uranium in 1970, 18.3 million pounds in 1975, 20.7 million pounds in 1980 and 25.8 million pounds in 1985. (See Affidavit of George White, Jr., Chairman of NUEXCO, Attachment 2 to Res. Motion for Summary Judgment.) DOE cites domestic utility requirements to have been 24.7 million pounds in 1980 and 34 million pounds in 1985 (DOE 1986 Viability Assessment, *infra*). Once the infrastructure of U.S. mines and mills has been abandoned and expertise has been dispersed, it will take years to revive a productive industry. Subsidized foreign producers can expect a lucrative payoff once domestic production has been displaced.

expressed about the future viability of the industry.[2] Finally, after experiencing three years of frustration because of DOE's refusals to act, Respondents initiated this case on December 7, 1984.

B. Economic History of the Amici Curiae States

It is well known that the economic history of the West has been one of exploitation, punctuated with periods of boom and bust. Early economic endeavors did not always bring long-term growth and economic stability.

The early fur brigades virtually exterminated the beaver from the mountain streams during the 1820's and 1830's. The hunters of the 1860's and 1870's did the same to the buffalo on the plains. Ranchers and farmers West of the 100th meridian tried to force more from the land than it could give. Timber barons used short-sighted methods in harvesting the riches from the forests.

Early mineral development brought about similar wide swings in economic activity. The Western region enjoyed spectacular economic growth following gold discoveries, and was later left with unspectacular ghost towns. Silver development ended with even more drastic results when the government withdrew its support for the silver market after 1893.

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[2]See correspondence attached as exhibits to the Complaint, particularly: Letter of Oct. 12, 1981 from Donald O. Rausch, President of Western Nuclear, Inc. to Shelby T. Brewer, Assistant Secretary for Nuclear Energy; Response of Nov. 27, 1981 from Mr. Brewer to Mr. Rausch; Letter of Nov. 12, 1981, from Mr. Rausch to William R. Voigt, Director, Office of Uranium Enrichment and Assessment; and response of Dec. 28, 1981 from Mr .Voigt to Mr. Rausch.

At the end of the 19th and the beginning of the 20th Century these Western territories achieved statehood. These states began providing services, levying taxes and sending their representatives to Washington. As a result of the amplitudes of prior economic cycles, concern had grown as to the wisdom of uncontrolled economic development. This concern led to an expanded role for state and national government.

It was in this historical context that Western representatives urged adoption of Section 161(v). This Section was designed to protect the domestic uranium industry from ruinous foreign competition and to protect the Amici States from the boom and bust cycle of mineral development.

When Section 161(v) was adopted, the domestic uranium industry had been developing for over fifteen years under the umbrella of the government's captive market, and Congress intended to maintain the industry's health. That intent, if carried out, would in turn assure the States that they would not have the financial and environmental burdens relating to an unexpected collapse of the industry.

Thus, the States believed they could plan and act to support the industry in anticipation of a stable economic future. The States could provide funds for building needed schools and roads and other segments of the infrastructure necessary to provide public services to mining and milling companies, their employees and their suppliers. Workers' compensation insurance rates could be set to provide funds to aid injured miners and other injured industry employees. Unemployment tax rates could be set to provide help to those facing temporary periods of un-

employment. Funds could be budgeted and policies and procedures could be set up to assure that a healthy uranium industry would coexist with a healthy environment. It was anticipated that such funds would be provided, in part, by taxes on a healthy, viable domestic industry whose employment rolls would remain stable.

The States have been disappointed. DOE has ignored Section 161(v) of the Atomic Energy Act and the States are suffering another economic bust. Although the effects are scattered and vary from State to State and from place to place within the affected States, the experience has been traumatic. For example, Wyoming's workers' compensation fund is severely depleted, and the experience in some localities has been disastrous.

In Fremont County, Wyoming, the home of Jeffrey City, the historical center of Respondent Western Nuclear's operations, which is fast becoming a modern ghost town, the statistics illustrate a dismal story. Between December, 1978 and December 1987, total State employment fell by 2.1%, and Fremont County employment fell by 19.3%. The unemployment rate for the State went from approximately 3.5% to 7.6%, while the unemployment rate for Fremont County rose from 3.6% to 9.3%. State mining employment fell by 9.5% and Fremont County mining employment fell by 62.4% between 1979 and 1984. Between 1978 and 1986 severance tax collections on uranium fell from $3.6 million to $991,000.00 in the State and from $1.7 million to $0 in the County. (Appendix)

The decline in the uranium industry has devastated Fremont County's general economy. Between the fall terms of 1978 and 1987, school enrollment dropped 9.4%

county-wide and by 82.8% in the Jeffrey City area, leaving vacant and under-utilized school facilities as continuing burdens. Between 1978 and 1986 the assessed value of property throughout the State of Wyoming (for real estate tax purposes) increased by 136.4%, generally in line with inflation. The assessed values in Fremont County, however, increased by only 70.0%. Between 1978 and 1986 retail sales tax collections increased by 68.1% State-wide, but only by 23.3% in Fremont County. Even more telling for the 1981-1986 period is a 67.6% decrease in Fremont County use tax collections compared to a State-wide increase of 18.9%.[3] (*Id.*)

C. History of Section 161(v) under DOE and AEC

Historically the AEC and DOE have always adhered to the concept that Section 161(v) is mandatory. Beginning in 1964 the AEC imposed a total ban on enrichment of imported uranium for domestic use. In 1974, during the hearings relating to the gradual relaxation of restrictions, AEC Commissioner Anders indicated that restrictions again would have to be imposed if the viability of the domestic industry were threatened:

> Should there be any indication that the proposed schedule is endangering domestic industry viability, U.S. self-sufficiency, or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate. *Proposed Modifications of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Committee on Atomic Energy,* 93rd Cong., 2d Sess. 6 (1974) (Testimony of Wm. A. Anders, Commissioner AEC).

[3]The experience in the other Amici States has been similar. Industry capital expenditures were $14 million in 1985 compared to $324 million in 1981. Employment dropped to 2400 person years in 1985 from 13,700 person years in 1981. Domestic uranium production was at its lowest level since the mid-1950's. DOE's 1985 Viability Assessment, Table 11 (DOE/EIA-0477(85))

The foregoing statement of Commissioner Anders was not isolated: he was reiterating the general theme of earlier Joint Committee Hearings.[4]

When, in 1981, Respondent Western Nuclear notified DOE of its concerns about the danger to domestic viability caused by DOE's enrichment of an increased percentage of foreign uranium, Assistant Secretary Brewer reaffirmed that DOE was required to reimpose restrictions when the industry became adversely affected by imports:

> DOE's surveys provide no demonstrable evidence that foreign-origin uranium *has* adversely impacted the domestic industry, a conclusion which you apparently do not dispute. Accordingly, there is no need at this time to revise the existing regulatory scheme. However, *as required by the statute, DOE will continue to monitor the situation and will revise the restrictions on the enrichment of foreign-origin uranium if the need arises.* (Emphasis added.) (Letter of November 27, 1981, n.2, *supra.*)

One can only conclude that between 1964 and 1981 DOE had not changed its opinion that Section 161(v) was mandatory. For those 17 years, the agency charged with administering the statute interpreted it to require restric-

[4]See Private Ownership of Special Nuclear Materials, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy, 88th Cong., 1st Sess. 114-15 (1963); Private Ownership of Special Nuclear Materials, 1964, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy, 88th Cong., 2d Sess. 154 (1964).

tions upon any indication that domestic industry viability was endangered or adversely affected by imports.

In 1964, a complete ban was presumed necessary; by 1974, a controlled phaseout of restrictions (to commence in 1977) with continual monitoring was set in motion to test the validity of that assumption. With intervening years and a change of political climate in the executive branch favoring DOE's enrichment empire at the expense of the domestic uranium producers, DOE recently came to presume that restrictions were not necessary until adverse impacts were *actually* experienced. DOE's attitude became one whereby it decided that Section 161(v) restrictions were not to be imposed to "maintain" the viability of the industry, but rather to counteract harm only after it had occurred. Even with this change of emphasis in the early 1980's, there was no doubt that the statute was mandatory in its coverage.

When Respondents initiated this case, DOE took the position that no restrictions were appropriate while the industry remained viable. To support this view, in December, 1984, within weeks of the filing of this case, DOE published its finding that the industry was viable during 1983. DOE denied the allegations in the District Court Complaint that the industry was not viable and also denied that the industry's viability was threatened. It therefore also denied its obligation to impose restrictions. (Joint App. 13-14, 23-24.)

However, in September, 1985, nine months after finding that the industry was viable during 1983, DOE published its finding that the industry had suddenly changed and was not viable during 1984. (Pet. Brief 10.) Then, to

avoid its earlier recognized responsibilities under Section 161(v), DOE changed its interpretation of the statute. At first DOE claimed that it had discretion under Section 161(v) to choose not to impose enrichment restrictions. After this theory was rejected by the District Court, DOE unilaterally concluded that restrictions need not be imposed because the industry would not be helped.

Prior to September, 1985 (when DOE found that the industry had not been viable in 1984) the question presented was whether DOE was required to impose restrictions when confronted with persuasive evidence that the industry's viability was threatened. DOE refused to implement the mechanism required by Congress to preserve the viability of the industry.

DOE now asserts that the question presented is whether or not it should be required to impose restrictions when it has determined that restrictions would not, at this late date, restore the industry to viability. Unfortunately, DOE did not move to impose restrictions during the 1981-1984 period because it insisted that the need had not yet arisen; now, for purposes of this case, it asserts that the need is so great that restrictions will not solve the problem. DOE's history of failure to preserve the domestic industry as required by the statute is now being used as the justification for abandoning the industry and its statutory duty.

DOE was unable to persuade either the District Court or the Court of Appeals that its lack of action justified its continued failure to carry out the statutorily mandated mechanism of imposing restrictions to serve the statutory

purpose of maintaining and preserving the viability of the domestic uranium industry.

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II. SUMMARY OF ARGUMENT

At the time Congress adopted Section 161(v) the domestic uranium industry had been maturing under the Government's protective umbrella for many years. Congress felt that the industry was of great importance to the Nation, and Congress was aware that private ownership of uranium would change the economic environment for the industry. For these reasons Congress concluded that the industry should be insulated from what might become ruinous foreign competition.

Thus, the goal or purpose of the statute was to preserve and maintain the industry's viability, and the mechanism Congress chose to accomplish that end was to require the AEC (now, DOE) to impose restrictions upon the enrichment of foreign uranium for domestic use. To assure that the viability of the industry would be maintained, Congress intended the statute to be a mandatory directive to DOE. This Congressional intent is reflected by the language used in the statute and the legislative history.

Moreover, the historical interpretation of the statute by the agency charged with administering it supports the view that the language of the statute is mandatory and that restrictions on enrichment of foreign uranium would be utilized to maintain a viable domestic industry. It is only recently that DOE has changed its interpretation of the

statute based upon its self-serving conclusion that, in its opinion, the statutory goal would not be served by imposing the very restrictions which the statute requires. DOE attempts to justify its change of position by asserting that, in its opinion, restrictions would not benefit the domestic industry. DOE must be rebuked in its attempt to substitute its judgment and its policy for the express policy and judgment of Congress.

The statute does not purport to protect the *utility* industry but it explicitly protects the *uranium* industry. The statute is not inconsistent with non-treaty trade agreements, but even if it were, the statute controls. DOE does not have the legal authority to choose a statutory interpretation which it believes will support its enrichment enterprises, the utility industry and foreign interests at the expense of the uranium industry and the States. DOE has only the statutory authority given it by Congress.

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III. ARGUMENT

A. The Rulings Below Were Legally Sound and Should be Affirmed

This case involves a straightforward question of statutory interpretation. The ruling below by the District Court and affirmed by the Court of Appeals for the Tenth Circuit is a correct interpretation of the plain meaning of the statute and is supported by both its legislative history and DOE's historical interpretation.

1. Plain Meaning of the Statute

The court below reiterated the long-standing rule of statutory construction that the starting point for interpreting a statute is the language of the statute itself. When the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances. (citations omitted, Pet. App. 15a, Pet. for Cert.)

"Shall" when used in a statute is ordinarily construed to be mandatory language. See *Anderson v. Yungkau,* 329 U.S. 482, 485 (1947) and *Board of Pardons v. Allen,* (Case No. 86-461) 482 U.S. —, 107 S.Ct. 2415, 2420 (1987). Section 161(v) speaks in such mandatory terms. The Statute mandates that DOE *shall not offer* enrichment services for foreign-source uranium for domestic use. Congress directed DOE to preserve and maintain the viability of the domestic uranium industry and mandated the mechanism to be utilized.

The Petitioner relies upon the case of *Young v. Community Nutrition Institute,* 467 U.S. 974 (1986) to contend that mandatory statutory language can be ambiguous when examined in conjunction with the legislative history and the historical agency interpretation of the statute. In *Young,* however, the statutory purpose of protection of public health had already been achieved and was in no danger of not being maintained or preserved. In this case, the statutory objective has been abandoned by DOE. The domestic uranium industry is no longer viable. An equivalent fact situation in *Young* would have presented the Court with a situation where there was not only an imminent danger to the public health, but a situation where

people were dead and dying. Could an agency then successfully argue that it need not take action because such action would not raise the dead?

The Court of Appeals correctly concluded in this case that "the DOE proposes to abandon the statutory goal" and ruled that:

> The unambiguous language of the statute requires the DOE to refuse enrichment of foreign uranium "to the extent necessary to assure" a viable domestic industry. The DOE may determine how much restriction is required to ensure viability, but it cannot decide not to impose restrictions when the industry is not viable. (Pet. App. *infra* at 18a.)

2. Legislative History

The legislative record is replete with support for the statutory interpretation advanced by Respondents. Much of that has been quoted elsewhere. Of particular illustrative value from the viewpoint of the Amici States are floor debate statements by two Western Congressmen. Section 161(v) was enacted, in large part, to protect the domestic industry from ruinous foreign competition and to provide industry stability. Mr. Aspinall of Colorado urged passage of Section 161(v) with some of the following comments:

> This legislation has been carefully drawn so as to minimize any possible economic dislocations.
>
> In particular, this bill will have an important effect on the domestic uranium industry.
>
> Today, after 10 years of intensive exploration, the United States has been converted from a have-not Nation in terms of developed uranium reserves to the point where we have some of the largest uranium re-

> serves in the world. We have, in the process, created a substantial uranium mining and milling industry. (110 *Cong.Rec.* Part 15, 20144 (daily ed., Aug. 18, 1964.))

After noting that by 1964 the government and U.S. taxpayers had developed a thriving and viable domestic industry, Congressman Aspinall observed that such investment would be protected under Section 161(v):

> Moreover this legislation, by providing a flexible restriction on the enrichment of foreign uranium, will protect our industry from possibly ruinous competition.
>
> The maintenance of a viable domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital to the long-range defense and security interests of the United States. *Id.* 20145

Congressman Morris of New Mexico spoke in favor of the legislation "as a Representative of one of the major uranium producing States" and expressed his pleasure "that the committee has taken special care to provide protection to our domestic uranium producers against the competition of cheap foreign uranium." Mr. Morris further observed that:

> The flexible restriction on the enrichment of foreign uranium contained in this bill will protect our industry against ruinous competition from cheap foreign uranium. Our uranium industry is a vital link in the national defense and security. It has been built and nurtured by vast Government expenditures. The Joint Committee had the foresight to protect our investment in this industry during a possible period of limited demand for uranium. (*Id.*)

Both the Joint Committee and Western Representatives understood that a viable domestic industry existed

in 1964 and had been funded by vast governmental expenditures. The goal of Congress in 1964, as embodied in Section 161(v), was not to achieve a viable domestic industry but to preserve and maintain a viable domestic industry which already existed. To this end, the DOE was charged with imposing restrictions, to the extent necessary, to protect the domestic industry against ruinous competition from cheap foreign uranium.

Cheap foreign uranium has flooded the domestic market in increasing volume in recent years and has been projected to capture well over half the market share. Congress intended that this should not occur and adopted Section 161(v) to prevent it. "If a court, employing traditional tools of statutory construction, ascertain that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

3. Agency Interpretation

Even though the plain meaning of the statute supported by its legislative history should be dispositive of the statutory interpretation question, Petitioner has urged this Court to adopt DOE's present interpretation of the subject statute.

The long-standing agency interpretation has been that restrictions are mandatory. It was only when the industry's non-viability could no longer be denied by DOE (September, 1985) that DOE changed the nature of its defense to Respondent's case. Rather than deny that the industry was non-viable and thereby deny that restric-

tions on enrichment of foreign uranium were then mandated, as it did at the outset of this case, DOE simply stated that it need not act to impose restrictions because they would not serve the statutory goal. DOE is violating the law by refusing to act as Congress directed and is grasping for justification. This Court has recently condemned such attempted agency lawmaking contrary to the will of Congress. *Louisiana Public Service v. F.C.C.*, 476 U.S. 355, 373-75 (1986).

The Petitioner again relies heavily upon *Young v. Community Nutrition Institute, supra*, in support of its assertion that agency interpretation should be given deference. However, the FDA's position in *Young* was conceded to have been long-standing and consistent with the controlling statute. DOE's position in this case is recently developed and contradicts its historical position and the statute. In *Young* the FDA responded to the problem in furtherance of the statutory goal. Here, DOE has refused to do anything at all.

If the statute were otherwise ambiguous and the legislative history not dispositive, this Court would be required to grant deference to long-standing agency interpretation of a statute it administers. However, the courts have never held that an agency, absent Congressionally delegated discretion, can change the law by changing its interpretation of the statute simply because the agency believes the statute has become inappropriate to the times.

DOE should be held to its long-standing interpretation of the statute that restrictions on the enrichment of foreign source uranium are mandatory.

B. Protection of the Interests and Expectations of the Amici Curiae States

As a result of DOE's failure to impose statutory restrictions in order to preserve and maintain the viability of the industry, the industry, the Amici States, the local communities of the Amici States, and the citizens of the Amici States have suffered and will continue to suffer with the burdens of over-built public facilities, reduced tax revenues and increased unemployment.

The Amici States were entitled to feel secure from the risks of another boom and bust cycle. The States were entitled to provide the infrastructure and other public services related to serving a viable industry with the expectation that the statutory commitment would be met. The States were entitled to plan for environmental safeguards with the expectation that the national government's commitment to the viability of the industry would enable the industry to provide those safeguards. The States were entitled to commit to other social and public services for their citizens with the expectation that a viable industry would help provide the means to meet those commitments.

The restoration of viability to the industry will serve, at least partially, to vindicate the rights and expectations of these States, and such a result is not as remote as the government argues. This country is the largest market for uranium in the free world, and its demand and consumption continue to grow. See, Brief of the Government of Australia, p. 2; Brief of Electric Utility Companies, pp. 5-6; Brief of Eldorado Nuclear Limited, *et al.*, p. 2; Figures 4 and 5, 1985 Viability Assessment, *supra*. If a meaningful portion of the tens of millions of pounds of foreign

uranium now expected to be consumed domestically in the next several years were to come from the domestic industry, the market price of domestic uranium would increase and the domestic industry would be helped. (Pet.Brief, 34.)

C. Response to Amici Utilities

The thrust of the Amici Utilities' argument is: that the statute grants DOE wide discretion as to whether or not to impose restrictions; that restrictions would not restore viability to the uranium industry and would harm the utility industry; that the DOE applied its discretion reasonably in deciding against imposing restrictions because DOE properly balanced the interests of the uranium industry against the interests of DOE and the utility industry; that Congress impliedly ratified the existence of DOE's discretion by adopting Section 170B, 42 U.S.C. 2210b, rather than a specific import restriction; and that the judicial branch must not interfere with administrative prerogatives.

The utilities' chain of logic is without a single sound link.

There is no disagreement that the statutory goal of Section 161(v) was the preservation and maintenance of a viable domestic uranium industry after private ownership became permissible. Congress provided the mechanism which DOE was to utilize to assure that goal: DOE *shall* impose restrictions on the enrichment of foreign uranium for domestic use. By plain meaning, legislative history, and historical administrative interpretation, the statute is not discretionary as suggested by the utilities.

The claim that restrictions would impose difficulties on the utility industry but not restore viability to the uranium industry is unsupported, self-serving, and irrelevant. The utilities do not deny that restrictions will cause an increase in demand for domestic uranium (Amici Brief of Utilities, 6-7) which should, under elementary economic theory, result in a higher price, and restore viability to the domestic uranium industry.[5]

Had Section 161(v) not been in existence, DOE's favoring of the utility industry's interest over the uranium industry's interest might have had some justification, but Congress has spoken and Section 161(v) does exist:

> First, always is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A. v. Natural Resources Defense Council, supra*, at 467 U.S. 842-3.

Congress has expressed its intent: DOE is to act to preserve and maintain the viability of the domestic industry by imposing restrictions upon enrichment of foreign uranium for domestic use. DOE is not free to advance the interests of its enrichment customers over

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[5]The utilities filed an affidavit in the Court of Appeals for the Tenth Circuit in support of DOE's request for stay pending appeal of the District Court's order. Mr. Steyn estimated that the price for domestic uranium would rise to $35 per pound and higher if the District Court's order took effect and restrictions were imposed on the enrichment of foreign-source uranium. He further stated that domestic production would have to double to replace foreign uranium. (See Affidavit of Julian J. Steyn dated July 3, 1986, attached to Joinder of Amici Curiae in Motion for Stay Pending Appeal filed July 16, 1986.)

the interests of the uranium industry. DOE does not have the right in this case to take on the job of reconciling different policies. The reconciliation decision was made by Congress in 1964 and affirmed by Congress in 1982 when Congress adopted Section 170B, which provided additional (not to be confused with substitute) mechanisms for preserving the viability of the uranium industry.

By ordering DOE to impose restrictions, the District Court below did not usurp DOE's prerogatives. Instead, the District Court interpreted the statute and utilized its inherent equitable powers to formulate a reasonable remedy. Since 1981, DOE had totally ignored its Section 161(v) responsibilities. The Court ordered temporary restrictions only until DOE, through the exercise of its rule-making authority, implemented its responsibilities. Rather than substituting its judgment for that of DOE, the District Court ordered DOE to conform its behavior and to exercise its authority in a manner consistent with the statute. The appropriateness of the District Court's Order is supported by the fact that DOE has yet to take one step toward implementing its authority consistent with its statutory duty. Nearly seven years have passed since it became evident that imports threatened industry viability and Respondents requested DOE to implement Section 161(v).

D. Response to Foreign Amici Interests

The importance of market share in the world's largest market for uranium, and the economic benefits to be derived therefrom, are underscored by Amici Briefs filed by the Government of Canada, Provinces of Canada, uranium companies located in Canada, and the Government of Australia. It is obvious that the foreign amici position is one founded on the proposition that implementation of Section 161(v) will harm their economic interests and benefit U.S. uranium producers and the states from which such production emanates. It should also be obvious that Congress intended exactly such a result in 1964 when it amended the Atomic Energy Act to include Section 161(v).

Canada, Australia, and Canada's uranium industry have made the assertion (which is similar to that of the Amici States) that they have made substantial investments, based in part on a reasonable expectation of continued access to the United States market. It is further asserted by Canada that the District Court's injunction unilaterally reverses United States trade policy toward Canada. Despite the fact that the mandatory statutory language of Section 161(v) has been on the books since 1964 (and foreign interests therefore were aware of U.S. law prior to making any investments) and despite the fact that courts do not "reverse" trade policy, the foreign amici attempt to drape their legal arguments in the fabric of an executive agreement: the General Agreement on Tariffs and Trade (GATT), (Oct. 30, 1947, 61 Stat. pts. 5, 6; P.I.A.S. No. 1700; 55 U.N.T.S. 61.)

Article XXI of the GATT specifically exempts uranium. Article XXI(b)(i) provides that nothing in the GATT shall be construed:

> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived.

Australia argues that the U.S. Government has not claimed an exemption under Article XXI of the GATT, but neglects to point out that it is not required of the United States Government, pursuant to GATT, to claim such an exemption inasmuch as the exemption is already set forth in the GATT itself. In fact, the United States Government has made its position clearly known to this Court and has stated that: "We do not necessarily agree with all of the assertions in those briefs [Canada and Australia] about the United States' obligations under international agreements and international law". (Pet. Reply Mem. 6 n.3, Pet. for Cert.)

In any event, it is clear that foreign economic interests cannot prevail over the economic interests of states of the United States based upon an executive agreement which exempts fissionable material and which was superseded by the passage of a statute which would, in any event, control.[6]

The reliance of the Respondents and the Amici States on the plain meaning of Section 161(v) and the expectation that the DOE would maintain domestic industry viability by restricting enrichment of foreign source uranium should not fall victim to a purposted "trade policy" between an administrative agency and foreign interests which negates explicit Congressional intent.[7]

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[6]See, generally, Henkin, *Foreign Affairs and the Constitution*, pp.164, 185-86, 413-14 (1972) for discussion and explanation that a statute passed later in time controls over earlier executive agreement. See, also, *Restatement of Foreign Relations Law of the U.S.* (revised) (tent.final draft 1985 § 135(1)(a)).

[7]Appendix C to the Amici Brief of Eldorado Nuclear Limited, *et al.* sets forth excerpts from the proposed Canada-US Free-

(Continued on following page)

CONCLUSION

DOE's argument that Congressionally mandated policy is not wise in the present uranium market should be made to Congress and not to the courts. The Decision and Order of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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March, 1988

(Continued from previous page)

Trade Agreement which has been submitted to Congress. And Congress, not DOE, is the proper forum for a policy decision on whether or not Section 161(v) should be amended to exempt Canada from restrictions on enrichment of its uranium intended for U.S. end-use.

APPENDIX

VERIFIED STATEMENT OF ANNE W. McGOWAN

I, Anne W. McGowan, being first duly sworn and put upon my oath do state:

1. I am the manager of information and research for the Economic Development and Stabilization Board for the State of Wyoming.

2. In that capacity, I am responsible for gathering, maintaining, summarizing and otherwise dealing with information and statistical data relating to the various components of Wyoming's economy, and the economics of its political subdivisions.

3. I have reviewed much of the information and statistical data available to the Board and available to me in my official capacity, and the following table contains information about the uranium mining and milling industry and its relationship to the general economy as it existed in the State of Wyoming for the years described.

/s/ Anne W. McGowan
ANNE W. McGOWAN

Sworn to before me
on March 15, 1988

/s/ Donna Witters
Notary Public

URANIUM INDUSTRY COMPARATIVE STATISTICS

EMPLOYMENT	DEC. 1978	DEC. 1987	INCREASE (DECREASE)
Statewide Employment	215,326	210,863	(2.1%)
Fremont County Employment	16,877	13,612	(19.3%)
State Unemployment Rate	3.5%	7.6%	———
Fremont County Unemployment Rate	3.6%	9.3%	———
	1979	**1984**	
State mining employment	33,570	30,386	(9.5%)
Fremont County mining employment	3,993	1,503	(62.4%)
URANIUM SEVERANCE TAX COLLECTIONS	**1978**	**1986**	
Statewide Sev. Tax Collections	$3.6 mil.	$991,000	(72.5%)
Fremont Cnty. Sev. Tax Collect.	$1.7 mil.	$ 0	(100.0%)
SCHOOL ENROLLMENT	**Fall 1978**	**Fall 1987**	
Fremont County	8,250	7,474	(9.4%)
Jeffrey City area	540	93	(82.8%)
REAL PROPERTY ASSESSMENT VALUES	**1978**	**1986**	
Statewide	$3.3 bil.	$7.8 bil.	136.4%
Fremont County	$220 mil.	$374 mil.	70.0%
TAX COLLECTIONS			
Retail sales tax—Statewide	$47.3 mil.	$79.5 mil.	68.1%
Retail sales tax—Fremont County	$ 3.1 mil.	$ 3.8 mil.	23.3%
	1981	**1986**	
Use tax—Statewide	$37.5 mil.	$44.6 mil.	18.9%
Use tax—Fremont County	$1.39 mil.	$0.45 mil.	(67.6%)